53582

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM
	)	CIRCUIT COURT,
vs.	)	
	)	COOK COUNTY.
EMILY KAYE, Defendant-Appellant.	)	HON. JAMES SULLIVAN, Presiding.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty at a bench trial of the crime of theft. The court assessed a fine of $300 and $5.00 costs, and defendant appeals.

Richard Rignall, a security guard employed at the E. J. Korvette department store in Matteson, testified that on February 25, 1968, he observed the defendant and a young woman, later learned to be defendant's 14 year old daughter, in the drug and cosmetic department of the store. The two women stood facing each other, looking over each other's shoulders as they took some 19 articles of cosmetics and toiletries from the merchandise racks and placed them into open purses which they had between them. They closed the purses and left the store without paying for the merchandise.

Rignall followed the two women outside the store, stopped them on the sidewalk, identified himself and requested them to open the purses. An examination of the contents of the purses revealed only merchandise taken from the drug and cosmetic department of the store.

Robert Reynolds, security manager of the E. J. Korvette store, testified as to the ownership by E. J. Korvette of the merchandise in question and placed the value thereof at $22.27. Admitted into evidence during this witness' testimony was a certificate of incorporation showing that the name of the corporation was changed from "E. J. Korvette" to "Spartan Stores" on June 27, 1967.

Defendant testified that she was in the E. J. Korvette store on the day in question and that she did take the merchandise out of

the store without paying for it. She testified, however, that the reason she failed to pay for the merchandise was because she and her daughter were discussing her daughter's forthcoming graduation and the purchase of shoes for the event, and they left the drug and cosmetic department without thinking to pay for the merchandise. Defendant stated that she and her daughter still had the merchandise in their hands after they were out of the store.

Defendant testified that once they were out of the store, she realized she had not paid for the merchandise. As the two women were placing the merchandise into their purses in anticipation of returning to the store to pay for it, defendant testified, Rignall appeared and asked them what they intended to do with the merchandise. Defendant stated she replied that she was going back into the store to pay for the merchandise, but that Rignall took them into the store for questioning.

Defendant further testified that she had seventy dollars on her person on the day in question and that she was employed as a nurse's aid in Blue Island. She denied any intention on her part to steal the merchandise from Korvette. On cross-examination defendant admitted that she could have walked from the drug and cosmetic department of the store into the shoe department without going outside the building as she had done.

Defendant's daughter testified and agreed with the account of the incident given by the defendant; she further stated that she and her mother had no intention of taking the merchandise without paying for it.

Defendant first contends that the trial court improperly denied her plea of Bar by Former Prosecution. She argues that a former prosecution for the same offense was "terminated improperly" so as to bar the present prosecution, under the terms of Section 3-4(a)(3) of the Criminal Code, inasmuch as the action, originally commenced

on May 28, 1968, was "terminated" that same day after the prosecuting witness had been sworn, and was finally tried on July 10, 1968, the assistant state's attorney having been told by the court to put in all the evidence, after which trial the judgment herein was entered. Ill. Rev. Stat. 1967, Chap. 38, Para. 3-4(a)(3).

We do not have the benefit of a report of the proceedings allegedly held on May 28th and consequently we are unable to tell precisely what occurred there. The report of proceedings filed herein reveals that at the hearing on defendant's plea of Bar by Former Prosecution held on July 10th, the trial court remarked that when the trial originally commenced (apparently on May 28th) the defendant objected to the manner in which the People sought to prove the incorporation of the victim during the testimony of the prosecuting witness; the court continued the hearing, apparently until the People were able to procure documentary evidence of the fact of the victim's corporate existence. Without the benefit of a report of proceedings as to what actually transpired at the hearing apparently held on May 28th, we do not know how far into the evidence the People had gone when the continuance was ordered, nor are we able to tell if defendant raised an objection to the continuance, if she remained silent, or if she consented thereto. Under the circumstances we cannot say that the continuance allegedly granted at the May 28th hearing was an "improper termination" of the prosecution such as is contemplated by Section 3-4(a)(3) of the Criminal Code. See Committee Comments to Smith-Hurd Ann. Stat., Chap. 38, 3-4(a); Model Penal Code, Sec. 1.08(4) (May 4, 1962 draft.)

Defendant next contends that the ownership of the merchandise was not proven beyond a reasonable doubt in that the evidence shows that Spartan Stores, not E. J. Korvette, was the "owner" of the merchandise. Section 15-2 of the Criminal Code defines the "owner" of property against which a crime is directed as "a person, other than the offender, who has possession of or any other interest in

the property involved,...and without whose consent the offender has no authority to exert control over the property." Ill. Rev. Stat. 1967, Chap. 38, Para. 15-2. Defendant herself recognized that the store from which she took the merchandise was the "E. J. Korvette" store; employees Reynolds and Rignall both testified that they were employed by E. J. Korvette; and Reynolds specifically testified that "the property belonged to E. J. Korvette." It cannot be seriously disputed that E. J. Korvette did have possession of the merchandise in question. See People v. Trefonas, 9 Ill. 2d 92, 99.

Defendant further contends that since the complaint alleged E. J. Korvette Inc., as the victim of the crime whereas the evidence showed that Spartan Stores was the "owner" of the merchandise, there was a fatal variance between the pleadings and the proofs. The certificate of incorporation proving the corporate status of the victim showed that the name of E. J. Korvette Inc., was changed to Spartan Stores prior to the date of the theft. Although the name may have been changed, the corporate entity remained as owner of the merchandise in question. Defendant was not surprised, misled or prevented by the variance from making her defense. See People v. Weisman, 296 Ill. 156, 161-162; People v. Rogers, 16 Ill. 2d 175, 183. The theft was from the same corporation whether called Korvette or Spartan.

The final contentions raised by defendant may be reduced to the single position that she was not proven guilty beyond all reasonable doubt. There exists a direct conflict between the testimony of the prosecuting witness and the testimony of the defendant concerning the incident. Rignall testified that he observed defendant and her daughter in the drug and cosmetic department of the store, standing facing each other and looking over each other's shoulders as they placed merchandise into the open purses between them. The purses were then closed and the two women left the store without paying for the 19 articles of cosmetics and toiletries, which were the only items

found in the purses upon a later examination thereof by Rignall. Defendant's story is that as she and her daughter were removing the articles from the shelves, they were discussing the daughter's forthcoming graduation and the purchase of shoes for the occasion. She claimed that they were so engrossed in their conversation that they absentmindedly left the store without paying for the 19 articles of cosmetics and toiletries which, defendant stated, they still had in their hands. After leaving the store and realizing they had not paid for the merchandise, defendant and her daughter began placing the merchandise into the purses in anticipation of returning to the store to make payment, when Rignall came upon the scene. This conflict was clearly a matter of weight and credibility to be determined by the trier of fact, which the trial court resolved in favor of the People. We find that the evidence supports the finding that defendant was guilty beyond a reasonable doubt.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS, P.J., and McCORMICK, J., concur.

112 I.A. 2nd 146

No. 52209

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
v.	)	COOK COUNTY.
LINDBERG P. EVANS (Impleaded), Defendant-Appellant.	)	HON. HARRY S. STARK PRESIDING.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

In a trial without a jury defendant was found guilty of the theft of property exceeding $150 in value and was sentenced to serve from one to four years in the penitentiary. He contends on appeal (1) that he was not proved guilty beyond a reasonable doubt, and (2) that the evidence was insufficient in that it did nothing more than link his physical presence to the vicinity of the crime. The second contention is subsumed by the first and as no evidence was offered on behalf of defendant, the case rests entirely on whether the State's evidence was adequate to establish guilt beyond a reasonable doubt.

On July 25, 1966 at about 3:30 a.m. Police Officer William Isdell was cruising south on Laramie Avenue near Lake Street in Chicago when he heard noises coming from an alley. He pulled his squad car into the alley and saw a group of men standing around a Buick station wagon. When they saw him they fled but were forced to run past the squad car, since the alley's only outlet was on Laramie Avenue. Officer Isdell was able to see their faces as the alley was fairly well lighted and they ran through the beam of his headlights. He testified that he had the men in sight for about 200 feet as they fled and he immediately put out a radio call describing the defendant as a male negro wearing a narrow brim straw hat and a light sport

shirt with dark trousers. He investigated the area and discovered that a burglary had been in progress.

Shortly after receiving the radio call, Police Officer John Rooney noticed defendant crouching between two buildings in an all white neighborhood approximately a block and a half from the scene of the crime. He told defendant that he fitted the description of a wanted person and called a squad car to take him to the scene of the crime. Before the car arrived, Officer Rooney arrested a second man. At the scene Officer Isdell made a positive identification of the defendant as one of the men he saw running away from him five minutes earlier. He was unable to identify the second man. Defendant was taken to the 15th District Police Station, informed of his rights and interrogated. He admitted that he had been involved in the burglary.

Joseph Reichel, president of the burglarized corporation, testified that defendant had been hired by the company four days before the occurrence of the crime. He also testified that the Buick station wagon found in the alley contained a quantity of copper anoids and certain custom made dies which had been taken from the factory. Some of the anoids had been immersed in a tank containing a cyanide solution which would have caused severe burns to the hands if they had been removed without rubber gloves. A pair of rubber gloves was behind the front seat of the station wagon found in the alley. Police investigation revealed that defendant lived some four miles from the place of arrest.

We proceed to consider defendant's contention that Officer Isdell's identification was insufficient because he

did not have an adequate opportunity to observe the men as they ran from the alley and therefore could give only a vague description of them. The sufficiency of identification is a question for the trier of fact and a court of review will not reverse on that ground unless the testimony is so unsatisfactory that a reasonable doubt exists as to the guilt of the accused. People v. Brengettsy, 25 Ill. 2d 228, 184 N.E.2d 849; People v. Brown, 86 Ill. App. 2d 163, 229 N.E.2d 922. In the instant case Officer Isdell's testimony reveals that the alley was well lighted and that he had a clear view of defendant as he passed through the beam of his headlights and alongside the squad car. When defendant and another suspect were brought to the scene of the crime, the defendant only was identified by Officer Isdell as the one involved. The identification was positive and Officer Isdell's testimony remained consistent throughout his cross-examination. The verdict was amply supported by the evidence.

Defendant also contends that the holding in People v. Christocakos, 357 Ill. 599, 192 N.E. 677 (decided before the Criminal Code was enacted in 1961) requires that when a conviction rests on circumstantial evidence, such evidence must be sufficient to prove guilt to a moral certainty and not just beyond a reasonable doubt. That argument rests on two assumptions: first, that the phrase "to a moral certainty" imposes a greater burden of proof on the State than does "beyond a reasonable doubt," and, second, that the probative value of circumstantial evidence is less than that of direct or testimonial evidence. Neither assumption is correct.

Prior to enactment of the Criminal Code of 1961, the

standard of proof required to support a criminal conviction was established by the courts as that "beyond a reasonable doubt." Some attempts to define that standard led to confusion. In People v. Vozel, 346 Ill. 209, 178 N.E. 473, where the defendant's conviction rested solely on circumstantial evidence, the court held that "amounting to a moral certainty" was a term which may be used in defining "beyond a reasonable doubt," but was not necessary to its definition and in fact added nothing to it. Carlton v. The People, 150 Ill. 181, 37 N.E. 244, was the first Illinois case which attempted to compare the two terms. The holding of the court included a quotation from Commonwealth v. Costley, 118 Mass. 1 (1875) that the "two phrases 'proof beyond a reasonable doubt,' and proof 'to a moral certainty,' are synonymous and equivalent." Christocakos, supra, and several other cases appear to ignore the rule laid down in the Vozel and Carlton cases and seem to impose a greater burden of proof on the State when its case rests on circumstantial evidence. The Criminal Code eliminated the confusion by providing that no person shall be convicted of any offense unless his guilt thereof is proved beyond a reasonable doubt. Ill. Rev. Stat., ch. 38, §3-1 (1967). No other standard of proof is set out nor should any other be employed.

Wigmore, the most enduring of all authorities on evidence, has pointed out that it is not possible to make a general assertion ascribing greater weight either to circumstantial or testimonial evidence. While each class has its peculiar advantages and dangers, neither can be said to be relatively more persuasive. 1 Wigmore, Evidence, §26 (3rd ed., 1940); See, also People v. Bailey, 90 Ill. App. 2d 121,

234 N.E. 2d 332; Ex parte Jeffries, 124 P. 924 (Okla., 1912). The State's burden of proof remains unchanged regardless of the class of evidence on which its case rests.

Finally, defendant argues that even if his guilt had to be proved beyond a reasonable doubt rather than "to a moral certainty," the State failed to meet its burden. In addition to the testimony of Police Officer Isdell identifying defendant, there was the fact that defendant had been hired by the burglarized company four days before the theft occurred; that some of the copper anoids were kept in a cyanide solution and would burn the hands if rubber gloves were not used in handling them; that defendant's employment afforded him the opportunity to learn of the use of the solution and the need for using rubber gloves and that a pair of rubber gloves was found in the station wagon in which the stolen anoids were found. All this together with defendant's admission to the police that he was involved in the crime plus the other evidence hereinbefore set forth amply proved defendant's guilt beyond a reasonable doubt. The judgment is accordingly affirmed.

JUDGMENT AFFIRMED

SULLIVAN, P.J. and DEMPSEY, J. concur.

112 I.A. 2nd 147

NO. 52975

ROLAND A. OLSON, Plaintiff-Appellee, vs. CITY OF CHICAGO, a municipal corporation, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY HONORABLE CHARLES S. DOUGHERTY, PRESIDING.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT:

The plaintiff, Roland A. Olson, sought a declaratory judgment in the Circuit Court of Cook County declaring the R-1 Chicago zoning classification void and unconstitutional as applied to his property. The court declared the ordinance void and unconstitutional as applied to the subject property, and the defendant City of Chicago appeals from this judgment.

The plaintiff is the owner of a vacant lot located at the northeast corner of West 103rd Street and South Prospect Avenue in Chicago. 103rd Street is a section line street. The subject property extends fifty feet along 103rd Street and extends 150 feet along Prospect Avenue. The rear lot line is approximately fifty-three feet on 102nd Place. The plaintiff's property was zoned R-1 which permits only single-family residences. The plaintiff's proposed use is a two-story, four unit townhouse apartment which would generally conform to an R-3 use on a section line street. Off-street parking would be provided for six cars. The lot has an area of approximately 7,770 square feet which would provide about 1,940 square feet per unit.

East of the subject property there are three single-family homes, a two-family home, a public park, and east of

the park there are several more single-family homes with possibly one or two two-family residences. Adjacent to the final residence in this row on the north side of 103rd Street is a relatively new Standard gasoline station on property which had been re-zoned B4-1. There is some conflict in the record as to the precise distance between the subject property and the B4-1 property, but it appears that the distance between the two properties is between 600 and 700 feet. The gasoline station is located on the northwest corner of 103rd and Charles Streets. The south side of 103rd Street extending east of Prospect contains a row of single-family dwellings to Church Street. Church Street approximately bisects Prospect Avenue and Charles Street and runs south from 103rd Street. To the east of Church Street on the south side of 103rd Street is property zoned B4-1 which is improved by stores and apartments for which a zoning variation was allowed. This B4-1 property is roughly across the street from the aforementioned gas station.

On both sides of Prospect Avenue south of 103rd Street the uses are single-family residences to the alley south of 103rd Street. On the block north of 103rd Street on Prospect the uses are also single-family houses with the exception of two nonconforming two-family residences which were erected prior to any zoning legislation.

We now turn to a description of the uses on both sides of 103rd Street west of the subject property. Directly west of the subject property there is a vacant lot at the northwest corner of 103rd and Prospect which has 200 feet of frontage on 103rd Street. Next west is a vacant frame

house. West of that vacant house is an apartment development under construction at the time of trial which will comprise six townhouses and twelve apartments. This property is approximately 400 feet west of the subject property, and the multiple units under construction were permitted by virtue of a declaratory judgment. This improvement provides 2,500 square feet per unit. West of this property to the end of the block at Wood Street is a row of twelve single-family residences ending with two two-family residences. On the south side of 103rd Street west of Prospect, there are three single-family residences fronting on Prospect. To the west of these residences on 103rd Street is another multiple dwelling development containing six townhouses and twelve apartments erected pursuant to a declaratory judgment in 1963. These improvements also have a density of 2,500 feet per unit. This property has 200 feet of frontage on 103rd Street and is located about 300 feet from the subject property. To the west of this property are three single-family residences, a two-family duplex, and two or three single-family residences.

The rule is well-established that one who attacks the validity of a zoning ordinance has the burden of showing by clear and convincing evidence that the classification is arbitrary and unreasonable as applied to his property and is without substantial relation to the public health, safety and welfare. (Schwinge v. Village of Niles, 101 Ill. App. 2d 406.) The presumption of a zoning ordinance's validity is overcome when the evidence shows a destruction of property value in the application of the ordinance and an absence of

any reasonable basis in public welfare requiring the restriction and resultant loss. (Nat. Bank v. County of Winnebago, 19 Ill. 2d 487; First National Bank v. County of Cook, 15 Ill. 2d 26.) In determining the validity of a particular zoning ordinance as applied, no single factor is controlling but consideration is given to the character of the neighborhood, the existing uses and zoning of nearby property, the amount by which property values are decreased, the extent to which this diminution in value promotes the health, safety, morals or general welfare of the public, the relative gain to the public as compared to the hardship imposed on the property owner, and the suitability of the subject property for the purpose for which it is zoned. (Myers v. City of Elmhurst, 12 Ill. 2d 537.) Each case must be decided on its own particular facts and surrounding circumstances.

It is undisputed that the plaintiff will sustain financial injury if the property were to remain zoned R-1. He purchased the property in 1965 for $8,250. Eugene Migely, a real estate broker and witness for the plaintiff, testified that he was familiar with land uses and values in the area and that, in his opinion, the subject property under the R-1 ordinance was worth no more than $5,000. He stated that one "could not come out economically" on the property as zoned for single-family residences and that the highest and best use would be to improve the property with townhouses or apartments. Edward Mangam, a real estate appraiser and broker who was called by the City, testified that the value of the property was $6,500 to $7,000 and that it would have

a value of $12,000 if it was put to its proposed use.

In characterizing the area surrounding the subject property as single-family residential, the defendant primarily confines its attention to the existing uses to the north and east of the subject property thereby ignoring the present uses west of the subject property on the north and south sides of 103rd Street. We are of the opinion that such a view unduly circumscribes a proper consideration of the relevant surrounding uses. It is true that the uses north and south of the property on Prospect Avenue are predominantly single-family residences. However, the subject property is in a row of properties which front on 103rd Street which is a section line street and which is well traveled. Therefore, the uses, on 103rd Street, are relevant to the proper disposition of the instant case. See: Van Laten v. City of Chicago, 28 Ill. 2d 157.

The City contends that the proposed use is not in keeping with the surrounding uses. However, property in the same block as the subject property and within 700 feet of it has been re-zoned B4-1 and is now improved by a gas station on the northwest corner of 103rd and Charles Streets. The half-block section on the south side of 103rd Street between Church and Charles Streets has also been rezoned B4-1 for commercial uses and has been allowed a variation to permit townhouses and apartments to also be constructed on that land. There are also two multiple dwelling developments each containing eighteen units on the south and north sides of 103rd Street west of the subject property. These developments are about 300 and 400 feet, respectively, from the subject property and were constructed pursuant to

declaratory judgments on property which had previously been zoned R-1.

There was no evidence adduced that any neighboring property would depreciate in value as a result of the proposed use. Elizabeth Ault who lives in the home to the east of the subject property testified that she opposed the proposed use because she purchased her home while understanding that the adjacent property was zoned for single-family use. However, she did not indicate that she would suffer a financial loss as a result of the plaintiff's proposed use. In fact, Richard J. McKinnon, a City Planner and its witness, stated on direct examination that there would be no detriment to the property abutting the subject property on the east.

The plaintiff offered the testimony of Eugene Migely and Ernfrid G. Johnson (who resides 450 feet west of the subject property), real estate experts, that the subject property would best be improved by townhouses or apartments. The City's expert witnesses, Edward Mangam and Richard McKinnon, stated the highest and best use of the property would be single-family use as zoned. Their conclusions were based on their opinions that the neighborhood was single-family residential and that the proposed use would detract from the residential amenities of the area. McKinnon acknowledged but disapproved of the number of court cases affecting property in the area which have been contrary to the existing zoning. He further testified that the corner of 103rd and Charles Streets could be characterized as "a business and commercial corner."

Both parties presented witnesses who testified to the position taken by the East Beverly Improvement Association, a local civic body, relative to the proposed use. It appears from the record that the association initially voted in favor of the proposed use, but, at the time of trial, the testimony of several of its members was conflicting as to whether the association had subsequently formally disapproved of the four-unit townhouse.

Mrs. Charles Gorman, a member of the association and an area resident, stated that she opposed the construction of a townhouse because she believed the neighborhood was a single-family residential area and because the addition of the four apartments would increase the traffic and parking in the area thereby increasing the danger to the children who played in the nearby Graver Park which had its entrance on 102nd Place behind the subject property. On cross-examination, plaintiff's counsel stressed the fact that the proposed use would provide for six off-street parking spaces.

A review of the record reveals the following undisputed facts. The plaintiff will sustain financial loss if the property retains its R-1 zoning classification. Through zoning amendments, variations, and legal actions, uses not conforming to single-family residences have developed on 103rd Street in each contiguous block west and east of the subject property. 103rd Street is a section line street. There is no evidence to indicate that the proposed use would cause any depreciation in the value of nearby properties. However, the evidence is conflicting as

to the highest and best use of the property. Mere conflict in testimony as to the highest and best use of property or as to the impact of the proposed use upon surrounding areas does not make irrebutable the presumption that an ordinance is valid. Bauske v. City of DesPlaines, 13 Ill. 2d 169.

[1] After an examination of the entire record in this case, we conclude that the trial court did not err in declaring the R-1 ordinance void as applied to the subject property. The fact that the plaintiff purchased the property with knowledge of its R-1 zoning classification can be considered by the court, but a zoning classification cannot be sustained solely because the plaintiff purchased the property with knowledge of the existing classification. (LaSalle Nat. Bk. v. City of Evanston, 24 Ill. 2d 59.) Any property owner has the legal right to challenge the constitutional validity of an ordinance as applied to his property. Where the evidence shows a destruction of property value by application of an ordinance the legislation may be justified only if it substantially promotes the public health, safety, morals, or general welfare. (Myers v. City of Elmhurst, 12 Ill. 2d 537; Nat. Bank v. County of Winnebago, 19 Ill. 2d 487.) We conclude that the finding of the trial court to the effect that the validity of the ordinance has been overcome will not be disturbed.

For the foregoing reasons, the judgment is affirmed.

AFFIRMED.

SCHWARTZ and DEMPSEY, JJ., Concur.

(3725—2M—12-68) 14

112 IA 288

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE JOSEPH H. GOLDENHERSH, Presiding Judge

HONORABLE GEORGE J. MORAN, Judge

HONORABLE EDWARD C. EBERSPACHER, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 3rd day of SEPTEMBER A. D. 1969, there was filed in the office of the Clerk of the Court an opinion of said Court, in words and figures following:

NO. 10956

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

CITY OF SPRINGFIELD, a municipal corporation, Plaintiff-Appellee, vs. DOROTHEA SAGER and HELEN RUNYAN, Trustees under Trust Agreement dated February 15, 1951, and CARLETON COMPANY, a Delaware corporation, Defendants-Appellants.	Appeal from the Circuit Court of Sangamon County. Honorable William H. Chamberlain, Judge Presiding.

AND RELATED CAUSES.

Goldenhersh, P. J.

Defendants, Dorothea Sager and L. K. Sager, hereafter called Trustees, and Carleton Company, a corporation, hereafter called Carleton, appeal from the judgment of the Circuit Court of Sangamon County in the amount of $7,500.00, in favor of the City of Springfield, hereafter called the City, and from the judgments entered in favor of the City, on Trustees' counterclaim, and Carleton's third party complaint, seeking to recover damages from the City for an alleged

breach of contract. The circuit court heard the case without a jury.

On March 17, 1959, the City entered into a contract with defendants Dorothea Sager and Helen Runyan[1] as Trustees, and others who are not parties to this litigation, under the terms of which the City agreed to install three twelve-inch and four ten-inch water mains in designated areas southwest of the City. The contract recites that the mains are for use in obtaining water service for lands owned by the contracting parties referred to as "customers", all of whom are subdividers. The land affected by the alleged breach of the contract is an 80 acre tract owned by Trustees.

The contract provides that the City will proceed with the work "as soon as is reasonably possible after receipt" of certain deposits, the customers will pay the cost of the project, the respective amounts each is to pay are to be determined between themselves, and each customer is entitled to four 3/4 inch domestic taps per allocated acre. The contract further provides the customers are not required to make payments or contributions until 30 days after each customer receives written notice that 75 new tap-ins are in use in a described area.

As contemplated by the contract, the customers entered into an agreement allocating between themselves the cost of the mains to be installed, the Trustees to pay $8,126.67.

[1] Helen Runyan resigned as Trustee, and defendant L. K. Sager was designated her successor.

In its complaint the City alleged that it had performed all the terms and conditions of the contract and Trustees had failed to pay the sum of $8,126.67, their allotted share of the cost of the mains.

Trustees, in their answer, allege the City failed to install four of the mains as agreed, that it was contemplated the entire project would "be completed and cost accounted as one job", the City allotted taps to the other signatories and discriminated against Trustees, and the City failed to make accounting of the cost of the jobs. Trustees admit they have not paid the sums claimed by the City. In a counterclaim they charge that by reason of the City's failure to perform, they suffered damages in the sum of $250,000.00.

Carleton filed a third party complaint against the City alleging ownership of the land in question and assignment of Trustees' rights under the contract; the City, in violation of the contract refused to annex certain subdivisions, and prays a decree ordering specific performance of the provisions of the contract which require the City to approve its annexation petition, and permit it to make certain water taps.

The trial court entered a "Final Judgment Order" finding the issues for the City on its complaint and entered judgment in the amount of $7,500.00. On the Trustees' counterclaim, and Carleton's

third party complaint seeking damages, it found the issues in favor of the City. On Carleton's count seeking specific performance it entered a decree finding that upon payment of $7,500.00 the City was required to furnish water service in accordance with the terms of the contract of March 17, 1959, and upon offer by Carleton to annex to the City such portions of a described subdivision in which it desired water services, the City could accept the property for annexation subject to certain conditions, or could reject the proposed annexation, but failure to accept the annexation does not affect the duty to furnish the water service.

All parties filed Notices of Appeal; the City has not prosecuted its appeal, and in oral argument counsel stated that the City has complied with the decree.

Trustees and Carleton contend that the evidence shows the City did not substantially perform under the contract of March 17, 1959, and its failure to perform excused Trustees from making any payments until performance of the precedent requirement.

The testimony shows that the City installed Section F prior to the execution of the contract, and because no easements were required, installed Sections D-1, D-2 and E during the summer of 1959. Section B was delayed until the City could obtain easements from the Village

of Jerome, construction started promptly thereafter, and the installation was completed in November, 1960. Easements for Sections C-1 and C-2 were not obtained until 1962, and the construction was completed in 1962. The last easement required was not obtained until 1963, and the installation was completed in 1963.

In an opinion filed by the trial court, it found that at the time the contract was executed all parties knew the easements must be acquired, upon acquisition the work was performed promptly, and this "constitutes an excuse" for the City's failure to complete the installations immediately, and as one job. The court further found that a valid notice and demand for payment were given by the City.

Defendant's next contention arises from a contract to which we shall refer as the Warson Road contract, executed on April 29, 1959, between the City and Carleton, in which the City agreed to "sponsor and supervise" the construction of 2500 feet of 6 inch water main along designated streets; Carleton agreed to deposit $12,500.00, and the parties agreed that 25 water taps allocated to Carleton were to be taken from the 75 such taps required before the City could request payment under the contract of March 17, 1959, and were not to be charged against the 4 taps per acre allocated under the contract of March 17. Admittedly the City did not perform under this contract,

and takes the position that to have done so would place upon the contract of March 17, 1959, an interpretation injurious to the interests of the other parties thereto. On November 3, 1959, the City and defendants entered into the second "Warson Road contract" for the construction of the main described, allocating to Carleton immediately, 25 taps, and agreeing that these are in reduction of the 320 taps to which Trustees are entitled under the contract of March 17, 1959.

In its opinion the trial court found that although the City breached the first "Warson Road contract" it became merged into the second, and any breach of the first contract was thereby waived.

With respect to the Trustees' counterclaim and Carleton's third party complaint the court found that the City had not breached the contract, Trustees and Carleton were in default of payments due after notice and demand and therefore can not recover the damages claimed to have resulted from the City's alleged breach.

In the review of a case tried without a jury, an appellate court should not disturb the findings of the trial court unless they are manifestly erroneous, People ex rel v. C. & N. W. Ry. Co., 17 Ill. 2d 307.

We have examined the notice upon which the City relies and find it to comply with the requirements of paragraph 16 of the contract.

We note further that in defendants' exhibit number 66, a letter addressed to the City, the Trustees did not question the sufficiency of the notice, but attempted to impose requirements precedent to payment not contemplated by the contract. From our review of the record we are not able to say that the findings of the trial court are manifestly erroneous.

Trustees and Carleton contend that the trial court erred, as a matter of law, in holding that the execution of the second "Warson Road contract" waived the breach of the first. It is not necessary to decide this question for the reason that assuming arguendo the court erred, there is no evidence of damages specifically allocable to the delay, if any, resulting from the breach.

Defendants argue that the trial court's finding that the delay in obtaining easements constitutes an excuse for the City's failure to perform in strict accordance with the contract disposes of only one facet of the City's alleged breach. They contend that the City breached the contract in refusing to accept Trustees' land for annexation and in refusing to permit the taps to be made. They argue that the major benefit which they were to receive from the contract was extension of existing distribution lines and the right to domestic tap-ins for houses in their subdivision, that despite the existence

of a main adjacent to the tract they sought to develop, from which they could have obtained water prior to the completion of the mains described in the contract, they were not permitted to make the requested tap-ins.

They argue that because the City refused to allocate tap-ins, Carleton could not develop its subdivision in accordance to plan. Despite this contention, the evidence shows that in each instance in which an application for a tap-in was made, and the fee paid, the tap-in was installed. Defendants' exhibit 137 shows 41 tap-ins installed in defendants' subdivision in the years 1960 through 1966. It is true that there were delays, some occasioned by a backlog of orders and some deliberate, because of the City's dissatisfaction with defendants' refusal to pay its share of the cost of the mains, but there is no evidence that any delays, unavoidable or deliberate, caused defendants loss or damage. There is no evidence except the uncorroborated testimony of Dorothea Sager and L. K. Sager to support the contention that the City in any way discriminated against defendants in favor of other customers. The testimony of Lee Nickelson, Chief Utilities Engineer for the City, shows that the other customers paid their respective shares of the cost of the mains, and the only reason that defendants were ever refused service was their refusal to pay their share of the cost of the project.

The City, in undertaking to conduct the business of supplying water, did so in its private, and not its governmental functions, Rosborough v. City of Moline, 30 Ill. App. 2d 167. It was under no duty to furnish a water supply to non-residents in the absence of a contract so to do, Rehm v. City of Batavia, 5 Ill. App. 2d 442. Having entered into a contract with the Trustees to supply water to land outside its limits, and not having itself breached the contract, the City could require performance of the contractual provisions on the part of the Trustees. The circuit court found that defendants, in refusing to pay the Trustees' allocated share of the cost of the mains, breached the contract, and we are unable to say that the finding is manifestly erroneous.

Defendants have briefed and argued grounds for reversal on the basis of factual issues which the trial court, in reaching its conclusions, obviously decided favorably to the City. Although the court did not make specific detailed findings of fact with respect to all the matters argued, findings adverse to defendants would not be manifestly erroneous.

Defendants have advanced, and argued with skill and eloquence, an ingenious theory of the damages flowing from the City's alleged breach. In view of the trial court's finding that they, and not the

City, had breached the contract, we do not further discuss the alleged damages or defendants' arguments with respect to them.

Defendants argue that the City, in failing to complete and "cost account" the mains as one job, increased the cost of the project to their detriment. We assume that the trial court, in entering judgment for $7,500.00 rather than in the amount claimed, gave consideration to the contention. Defendants' exhibits 102 through 131 reflect the City's expenditures and we cannot say that the circuit court erred in its determination of the amount due.

For the reasons stated the judgment of the Circuit Court of Sangamon County is affirmed.

Judgment Affirmed.

Concur: George J. Moran

Concur: Edward C. Eberspacher

PUBLISH ABSTRACT ONLY

NO. 68-197 112 I.A. 2nd 330 Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

BONNIE L. NICKELL, Plaintiff-Appellee, vs. WILLIAM L. NICKELL, Defendant-Appellant.	Appeal from the Circuit Court of the 17th Judicial Circuit, Winnebago County, Illinois.

PRESIDING JUSTICE THOMAS J. MORAN DELIVERED THE OPINION OF THE COURT:

This appeal arises from an order of the trial court whereby defendant's petition for modification of a prior divorce decree was refused and plaintiff retained custody of the two daughters, aged two and five.

The sole point raised by the defendant is that the trial court erred in refusing to modify custodial provisions of the decree in view of changed conditions and, in doing so, was arbitrary as against the manifest weight of the evidence.

The defendant, his mother and his great aunt testified that plaintiff kept a filthy and unsanitary house, that the children were dirty and without clean clothes, that their medical and dental needs were not attended to and that foul language was used in the home frequently enough for the children to be using the same.

Evidence was given to the fact that plaintiff's paramour spent the night on numerous occasions (a fact that the children were aware of) and that the two were in bed together while the children were in and out of the bedroom. Plaintiff admitted that this situation existed but when asked why she did not marry the man, answered, "I don't feel I'm ready for marriage right at the time."

Defendant claims that, since his re-marriage, he would be able to provide a proper environment for the children. He stated that it would be unnecessary for his present wife to work, thus providing full time supervision for the children, unlike the current situation wherein his ex-wife works as a bar manager from 3:00 P.M. until 1:00 A.M.

Plaintiff presented two witnesses, a neighbor and a baby-sitter, both married women, who testified that plaintiff always kept her house well, that the children were tended to and that defendant was frequently intoxicated. Testimony was given to the fact that defendant, during his first marriage, frequently woke the children at 3:00 or 4:00 A.M. after returning from the tavern and that, on one occasion of intoxication, came home and, with a BB gun, shot glasses off of the fireplace.

Plaintiff claims that defendant is still a heavy drinker, that he appeared at her place of employment in an inebriated condition and caused a disturbance sufficient to have brought about her dismissal and that he is well in arrears on child support and alimony. Of record is the fact that defendant's second wife is a waitress at the tavern owned by defendant's family, that she works from 8:00 P.M. until 1:00 A.M. and that she has performed professionally as a go-go dancer since her marriage.

On cross-examination, defendant admitted that he had slapped his present wife across the face during a recent argument although the marriage was only three weeks old at the time the testimony was taken.

Although the person of an "investigator" is mentioned, in passing, both during the plaintiff's testimony and again when the court handed down its order, the record does not properly apprise this Court of any investigation.

In delivering his decision to leave the children in the custody of their natural mother, the court said:

> "...Under the circumstances, I'm not going to change the custody at this time. I took the situation into consideration. I thought it was the best thing to do. I want to leave the children with the natural mother, and I think possibly it is the thing to do in this case.
>
> There are certain corrections that should be made. And I think it is apparent what that is.
>
> The other offer, there would be no one there to take care of the children. The present wife has only been married a short time, and she is working. And his mother is also working. I don't think there's a lot of stability there.
>
> I'm going to leave the children with their natural mother."

It is unfortunate that the court was not specific in the corrective measures necessary or that such corrections were not made conditional to the awarding of custody.

It is apparent that the denial of the petition in this case does not truly solve the question with which the trial court was faced, that being what, under the circumstances, is in the best interest of the children. By denying the petition, the court is, in reality, informing the mother that her illicit relationship, performed in the presence of her minor daughters, has the stamp of approval from the court. While it is a commonly held principle that the children be left in the keeping of their natural mother whenever possible it is not necessary to follow such principle when the mother is admittedly, openly and unrepentedly engaging in an illicit relationship and exposing the children to such conditions. Indeed, to permit such circumstances would not only condone the mother's behavior but would, in essence, be stating that there is little, if anything, a mother may not do that would warrant a court removing the children from her custody.

On the other hand, reversal of the order of the trial court would grant the defendant the custody sought herein and would place two minor daughters in what the trial court

has established to be an unsuitable home. This, we agree, would not be the answer.

After studying the record, this Court fails to find that either plaintiff or defendant has established personal standards sufficient to provide a healthy, suitable environment for a five year old and two year old girl.

Realizing the grave responsibilities placed upon the trial court in matters such as this and aware of the sincerity with which the trial court approached this particular situation, we suggest that the decision should not be based on the choice of the lesser of two evils.

This matter is therefore reversed and remanded with directions that the trial court hold further hearings and thereby determine to whom the custody of the children should be awarded, upon a basis of what is in the best interest of the children. In reaching this decision, the court should consider placing the children in the custody of a third party or agency, if this be deemed necessary, or include within its order the appropriate conditions called for in granting custody.

REVERSED and REMANDED WITH DIRECTIONS

Abrahamson and Davis, J.J. - Concur

53584

112 I.A. 2nd 360

SHARON ORSI and DONNA ORSI, a minor, by REGINA ORSI, mother and next friend,

Plaintiffs-Appellants,

vs.

FRANCES P. YOUNG,

Defendant-Appellee.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY

HON. DAVID A. CANEL, PRESIDING

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

This appeal is brought by plaintiffs from an order dismissing their suit at a scheduled pretrial conference and from an order denying plaintiffs' petition to vacate said order of dismissal and to reinstate the case. No briefs were filed by the appellee.

The record shows that plaintiffs, minors, brought this action against the defendant for personal injuries on September 19, 1967. On July 12, 1968, Judge David A. Canel entered an order setting the cause for pretrial on Tuesday, August 20, 1968. The order recited that the plaintiffs, the plaintiffs' attorney, the defense attorney and a representative of the insurance carrier must be present. The order further recited that if the plaintiffs and the plaintiffs' attorney failed to appear the cause would be dismissed for want of prosecution. Further, if the defense attorney and a representative of the insurance carrier failed to appear, the order provided that the plaintiffs would be permitted to proceed to process their cause to verdict and judgment.

The record reveals that a pretrial conference was held on August 20, 1968, and that it was attended by the plaintiffs' lawyer and an attorney representing defendant's insurance carrier. When Judge Canel inquired into the

presence of the plaintiffs their attorney presented a letter written by the mother of the plaintiffs explaining that they were in Mexico. Plaintiffs' counsel requested that the cause be put back on the trial calendar or, in the alternative, that it be continued until the plaintiffs returned so they could attend the pretrial. Counsel also informed the court that he had been told by the defendant's counsel that no offer would be made in settlement. Judge Canel entered an order on the same date dismissing plaintiffs' suit for failure of plaintiffs to be present at the pretrial conference in violation of Supreme Court Rules 218 and 219(c) (Ill. Rev. Stat., 1967, ch. 110A, §§218, 219) and in violation of the order entered on July 12, 1968.

Subsequent to August 20, 1968, plaintiffs' attorney obtained a written stipulation from the defendant's attorney to vacate the dismissal order and to reinstate the cause. Plaintiffs' counsel included this stipulation in a verified petition to vacate and to reinstate the cause which he presented to the court on September 19, 1968. Judge Canel denied the plaintiffs' petition.

The pretrial hearing is an informal conference in which the court attempts to simplify and narrow the issues between the parties. This may result in stipulations and admissions as to facts or exhibits. In negligence cases, for example, it is possible to agree upon medical bills, hospital records, sketches, measurements, distances, and documents. To do this the attendance of attorneys and their clients may be required by the court. It is not unusual during these proceedings that the court will inquire whether there is a possibility of adjusting the case without trial. It is common knowledge that a substantial number of cases are adjusted

amicably in a matter of minutes at pretrials.

In the case at bar, it is clear that plaintiffs' counsel did appear on the pretrial date, did present a letter from the plaintiffs indicating that the reason for their absence was because they were in Mexico and did request a continuance so they could be present. The question before us then, is whether the trial court should have granted the requested continuance.

The relevant section of the Civil Practice Act (Ill. Rev. Stat., 1967, ch. 110, §59) provides that "[o]n good cause shown, in the discretion of the court and on just terms, additional time may be granted for the doing of any act or the taking of any step or proceeding prior to judgment." The trial court, therefore, possesses a broad discretion to allow or deny a motion for continuances, but it is a discretion which must be exercised judiciously, and not arbitrarily. Furthermore, "[a] continuance should not be denied where clearly it is required by the ends of justice, and a refusal to grant it is an abuse of discretion warranting reversal." Brown v. Air Pollution Control Board, 37 Ill. 2d 450, 454,-55, 227 N.E.2d 754, 757.

We conclude under the circumstances of this case that the trial court abused its discretion in not granting a continuance and in dismissing the cause. The judgment of the Circuit Court is reversed and the cause is remanded for trial.

REVERSED AND REMANDED.

ADESKO, P. J. AND MURPHY, J.

CONCUR.

(Abstract only)